



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 24, 1996

Mr. Mark C. Rains
Cullen, Carsner, Seerden & Cullen, L.L.P.
P.O. Box 2938
Victoria, Texas 77902-2938

OR96-1001

Dear Mr. Rains:

As counsel for the Victoria Independent School District (the "school district"), you ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 39750.

The school district received a request for "all attorney's fee invoices, bills and billing summaries from any lawyers who were paid by VISD for the years 1994 through the present." You assert that portions of the requested information may be withheld from required public disclosure under sections 552.101, 552.103, and 552.107(1) of the Government Code.¹ We have considered the arguments you raise and have reviewed the representative sample of the requested information submitted to this office.²

¹You also raised section 552.105 with regard to several entries in Exhibit 2 of the representative sample of information submitted to this office, but not until April 5, 1996. The original open records request was received by you on March 21, 1995. As you did not raise this exception within the ten day deadline required by section 552.301(a), we conclude that you have waived this exception.

²In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office are truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.101 excepts information deemed confidential by law, either constitutional, statutory, or by judicial decision. You maintain that the responsive records contain information which is confidential pursuant to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, because they are maintained by the school district and contain personally identifiable student information.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. In this instance, however, you have submitted to this office a sampling of de-identified information. "Education records" under FERPA are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). See also Open Records Decision Nos. 462 (1987), 447 (1986). Since the records submitted to this office are de-identified and do not personally identify a particular individual student, the material does not contain information which is confidential under FERPA and, therefore, may not be withheld under FERPA. With regard to the records held by the school district but not submitted to this office for review, we note that information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978).³

You also raise section 552.101 in conjunction with the common-law right to privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *Id.*

³But see 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student's education records). See also Open Records Decision No. 431 (1985) (Open Records Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student).

at 685; Open Records Decision No. 611 (1992) at 1. We find no information contained in the information provided to this office that is highly intimate and embarrassing. Consequently, we conclude that you may not withhold any of the requested information under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You also assert that portions of the requested information are excepted from required public disclosure under sections 552.103(a) and 552.107(1).

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision Nos. 638 (1996) at 2-4, 551 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). Open Records Decision No. 638 (1996) at 2.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.*

Thus, section 552.107(1) protects only the essence of the confidential relationship between attorney and client from the disclosure requirements of the Open Records Act. Open Records Decision No. 574 (1990) at 5. A governmental body may not withhold fee bills in their entirety under this exception but may withhold only information about the details of the substance of communications between the attorney and the client. Mere factual notations or notations concerning information garnered by third parties are not protected by section 552.107(1). *Id.* at 7. Moreover, if a governmental body seeks to withhold attorney fee bills under section 552.107(1), the governmental body must identify the portions of the bills that reveal client confidences or attorney advice. *See* Open Records Decision No. 589 (1991).

You state that certain entries contained in Exhibits 1, 5, 7, 8, and 13 of the representative sample submitted to this office relate to "an employee who continues to have a combination of eight separate legal matters pending with V.I.S.D." and, thus, should be protected by sections 552.103(a) and 552.107(1). Having reviewed these entries, we conclude that the school district has met its burden of demonstrating that the descriptions of the services in the entries relating to this employee are related to pending or reasonably anticipated litigation and, therefore, may be withheld under section 552.103.⁴ You have not explained, however, how the amounts or nature of attorneys' fees are at issue in this litigation. Therefore, you may not withhold the dates of services, the initials of the providers, or the time and dollar amounts associated with these services under section 552.103(a). We also conclude that the dates of services, the initials of the providers, and the time and dollar amounts associated with these services are purely factual and, therefore, may not be withheld under section 552.107(1). We have marked the information relating to this employee which may be withheld pursuant to section 552.103(a). The remainder of the information relating to this employee must be released to the requestor.

You also state that certain entries in Exhibits 2, 5, 9, 10, 11, 12, and 13 relate to pending Equal Employment Opportunity Commission/Texas Commission on Human Rights Complaints. This office has previously held that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission. See Open Records Decision No. 336 (1982). Having reviewed the entries relating to these pending complaints, we conclude that, as above, the descriptions of the services in the entries relating to these pending complaints are related to reasonably anticipated litigation and, therefore, may be withheld under section 552.103(a).⁵ Again, however, you have not explained how the amounts or nature of attorneys' fees are at issue in this anticipated litigation and, therefore, you may not withhold the dates of services, the initials of the providers, or the time and dollar amounts associated with these services under section 552.103(a). We also conclude, again, that the dates of services, the initials of the providers, and the time and dollar amounts

⁴As we rule that the descriptions of these services may be withheld under section 552.103(a), we need not address your argument that section 552.107(1) also excepts the descriptions of the services from required public disclosure.

⁵As we rule that the descriptions of most of these services may be withheld under section 552.103(a), we need not address your argument that section 552.107(1) also excepts these same descriptions of services from required public disclosure. However, we note that you have marked certain entries on page 6 of Exhibit 12 and page 11 of Exhibit 13 which we cannot attribute to any particular pending or reasonably anticipated litigation. Because you have marked these entries and, in addition, have raised section 552.107, we conclude that portions of these entries reflect either confidential communications from the client to the attorney or the attorney's legal advice or opinions and, therefore, may be withheld under section 552.107(1). We have marked the information in these entries which may be withheld under section 552.107(1).

associated with these services are purely factual and, therefore, may not be withheld under section 552.107(1). We have marked the information relating to these pending complaints which may be withheld pursuant to section 552.103(a). The remainder of the information relating to these pending complaints must be released to the requestor.

In reaching the conclusion that the descriptions of services in the entries relating to the above matters may be withheld under section 552.103(a), we assume that the opposing parties to the pending or anticipated litigation have not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the pending or anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also state that certain entries in Exhibits 2 and 5 relate to "an employee investigation, complaint and grievance which is ongoing." As we conclude that you have failed to demonstrate that litigation is reasonably anticipated with respect to these entries, you may not withhold these entries under section 552.103(a). However, as we also conclude that portions of these entries reflect either confidential communications from the client to the attorney or the attorney's legal advice or opinions, we have marked the portions of these entries which may be withheld under section 552.107(1).

You also state that the entries contained on pages 12 and 13 of Exhibit 9 should be withheld under sections 552.103(a) and 552.107(1) because the school district has received a Notice under the Texas Tort Claims Act with regard to the event to which these entries pertain. You do not, however, represent that the claim is in compliance with the notice requirements of the Texas Tort Claims Act, Civ. Prac. & Rem. Code ch. 101, or applicable municipal ordinance, *see* Open Records Decision No. 638 (1996) (fact that governmental body received claim letter that it represents to this office to be in compliance with notice requirements of Texas Tort Claims Act, Civ. Prac. & Rem. Code ch. 101, or applicable municipal ordinance shows that litigation is reasonably anticipated), and, therefore, we conclude that you have failed to meet the requisite showing that litigation is reasonably anticipated with respect to these entries. You may not rely upon section 552.103(a) as a basis for withholding this information.⁶ As for your

⁶We note that if, in the future, you assert that section 552.103(a) is applicable on the basis of a notice of claim letter, you should affirmatively represent to this office that the letter complies with the requirements of the TTCA or applicable municipal statute or ordinance, or otherwise establish that section 552.103 applies.

claim that these entries may be excepted from required public disclosure under section 552.107(1), we conclude that the description of services in these entries are purely factual and, therefore, may not be withheld under section 552.107(1).

Finally, we address your assertion that the release of references to law enforcement officials contained in Exhibits 2, 5, 10, and 11 could jeopardize ongoing federal and state criminal investigations. Where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 of the Government Code may be invoked by any proper custodian of information which relates to the incident. Open Records Decision Nos. 474 (1987), 372 (1983). However, section 552.108 relates to law enforcement and prosecution records and may not be used to withhold from required public disclosure information contained in attorney fee bills.

In conclusion, we have marked the information which may be withheld from required public disclosure. The remaining information must be released to the requestor. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Todd Reese". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/rho

Ref.: ID# 39750

Enclosures: Marked documents

cc: Mr. John Griffin, Jr.
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(w/o enclosures)